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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76- 1685

THE POST COMPANY, KNUJ, INC. AND
MICKELSON MEDIA, INC., *Petitioners,*

v.

NATIONAL CITIZENS COMMITTEE FOR
BROADCASTING, *et al., Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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The Post Company, KNUJ, Inc. and Mickelson Media, Inc., petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 1, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix filed by the Federal Communications Commission (FCC App. A, pp. 1-60)

to its petition for a writ of certiorari. The *Second Report and Order* of the Federal Communications Commission in Docket 18110 (FCC App. B, pp. 61-147) is reported at 50 FCC 2d 1046 (1975) and its *Memorandum Opinion and Order* (FCC App. C, pp. 148-158) denying petitions for reconsideration at 53 FCC 2d 589 (1975).

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1977. (FCC App. D, pp. 159-160). On April 5, 1977, the Court of Appeals granted a partial stay of its mandate. (FCC App. E, pp. 161-167). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970) and 28 U.S.C. § 2350(a) (1970).

QUESTIONS PRESENTED

The decision of the Court of Appeals presents the following questions:

1. Whether the First Amendment and the Communications Act require that in the absence of any showing of public harm, newspapers and broadcast stations in the same community which have long been commonly owned must now be broken apart by divestiture.

2. Whether the Court of Appeals exceeded its proper role of judicial review when it determined as a matter of policy that irrespective of the number of print and electronic voices within a community, no daily newspaper and broadcast station in that community may be commonly owned.

3. Whether the Court of Appeals exceeded its proper role of judicial review when it remanded to the Federal Communications Commission with instructions to adopt a specific rule rather than to reconsider and reach its own conclusion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the Constitution and the pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706 (1970), and the Communications Act of 1934, as amended, 47 U.S.C. § 309 (1970), are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Principally at issue is whether broadcasters as a class should be stopped from publishing daily newspapers in their local communities or whether newspaper publishers may be disqualified from owning and operating a broadcast station in their community of publication irrespective of the absence of any evidence to suggest that the public interest is disserved thereby. In 1968, the Federal Communications Commission (Commission) initiated Docket No. 18110 with the adoption of a *Notice of Proposed Rule Making*, 33 Fed. Reg. 5315, by which it was proposed to prohibit common ownership of broadcast stations in different broadcast services in the same market, i.e., common ownership of TV-AM, TV-FM or AM-FM stations would be prohibited. The proposed rules would have been prospective in nature and no divestiture of existing facilities was contemplated. FCC App. B, p. 61. In 1970, the Commission issued its *First Report and Order*, 22 FCC 2d 306, in which it adopted new rules which prospectively prohibited common

ownership of VHF television stations and radio stations in the same market. They permitted AM-FM combinations and provided that applications involving common ownership of UHF television and radio stations would be decided on a case by case basis. The new rules do not require divestiture of any existing facilities. They prevent any new such combinations from being created and provide that any sales by the owner of a VHF station and one or two radio stations in the same market be to different parties. The rules did not address common ownership of newspaper and broadcast stations. *Id.* at 62.

Simultaneously with the adoption of the new rules, a *Further Notice of Proposed Rule Making*, 22 FCC 2d 339 (1970) was issued in which it was proposed that as to common ownership of broadcast stations and daily newspapers in the same market, divestiture within five years would be required to reduce one party's holdings in any market to one or more daily newspapers or one television broadcast station or one AM-FM combination. The Post Company, KNUJ, Inc. and Mickelson Media, Inc. all participated in Docket No. 18110 by opposing the proposed rules and divestiture. They contested the statutory and constitutional authority of the Commission to adopt such rules, argued the lack of wisdom in any such rules and concluded that if any divestiture was in fact required, it should only be in those markets where a monopoly exists.¹

The Post Company is the publisher of the *Post-Register*, a daily newspaper of general circulation pub-

¹ Reply Comments of The Post Company at 3-4 (March 15, 1974).

lished in Idaho Falls, Idaho and is the licensee of Station KIFI-TV (Channel 8), Idaho Falls, Idaho. Idaho Falls has a 1970 census population of 35,776. The *Post-Register* has an evening circulation of 19,218, a morning circulation of 4,370 and a Sunday circulation of 24,089.² The paper is independent and has been published since 1880. The Post Company has been the licensee of Station KIFI-TV since 1961.³ Station KIFI-TV places a city grade contour over Idaho Falls and Pocatello, Idaho. From the inception of the Television Table of Assignments in 1952, Channel 8 was assigned to Idaho Falls, Idaho. In 1961 the owners of the *Post-Register* had the mettle to bring Idaho Falls the first television station to compete with Station KID-TV which had been in operation since 1953. Indeed, one commercial channel in Idaho Falls and three commercial channels in Pocatello are still idle today. Among other things, The Post Company pointed out to the Commission in its 1971 Comments that in Idaho Falls it was the newspaper which supported and subsidized the television station enabling it to continue operation in the face of substantial losses. It was not until 1973 that Station KIFI-TV first earned a profit.

KNUJ, Inc. has been the licensee of Station KNUJ since 1949 and of KNUJ-FM since 1966, both of which are licensed to New Ulm, Minnesota. Mickelson Media, Inc., with substantially the same ownership as KNUJ, Inc., is the publisher of the *New Ulm Journal*,

² Editor and Publisher, Inc., Editor and Publisher Market Guide 1977, 119 (1976).

³ Eastern Idaho Broadcasting and Television Company, the original licensee of KIFI-TV, after a merger of the companies, changed its name to The Post Company effective January 1, 1966.

a daily newspaper of general circulation published in New Ulm, Minnesota. New Ulm has a 1970 census population of 13,051. The *Journal* has evening and Sunday circulations of 12,731.⁴ Were it not for the pioneering efforts of the *Journal's* owners in radio, New Ulm could well be without the present facilities of its only AM station⁵ and its FM facility substantially delayed awaiting some other applicant. On this very point the Commission's chairman testified before Congress on May 10, 1977:⁶

For many years, the Commission encouraged newspaper-broadcast cross-ownership because of the important contribution it believed such owners would make to the development of radio and, later, television broadcasting. The Commission repeatedly found that licensing broadcast stations to newspaper owners in the same community was in the public interest and otherwise consistent with agency policy. However, a broad examination was initiated in 1970 to determine whether the Commission should continue to sanction such ownership. After a review of all comments submitted and facts of record, we concluded that changed circumstances now warranted a different policy with respect to newspaper ownership of new broadcast facilities, but found no specific abuses by existing owners which would warrant an across-the-board divestiture of existing newspaper-broadcast combinations.

⁴ Editor and Publisher Co., Inc., Editor and Publisher Market Guide 1977, 228 (1976).

⁵ Applications for construction permits for AM stations are granted only if the engineering demonstrates that they "fit" under the Commission's interference standards. Had KNUJ's frequency been applied for elsewhere in that part of the country it could have been precluded at New Ulm.

⁶ Testimony of Richard E. Wiley before the Senate Subcommittee on Communications, May 10, 1977.

At the time of this action, there were approximately 79 newspaper-broadcast combinations, most of which the Commission permitted to continue. However, we did order divestitures in 16 "egregious" situations where communities were served by only one media voice.

Unless the decision of the Court of Appeals is reversed, The Post Company, KNUJ, Inc. and Mickelson Media, Inc. will be adversely affected. Neither ownership group has any broadcast interest other than the ones here subject. Not only did the ownership of the petitioners pioneer in the print and electronic media in these grass roots communities, but also provided leadership in public affairs in their respective areas and states. Thus trading for other media in distant communities or disposing of the particular newspaper is totally foreign to their concern for community involvement.

In neither Idaho Falls, Idaho nor new Ulm, Minnesota, would divestiture be required under the standards adopted by the Commission in its *Second Report and Order*, 50 FCC2d 1046 (1975). There the Commission evaluated the proposed newspaper-broadcast ban and upon weighing various factors concluded that while diversity is to be sought after, a wholesale restructuring of the broadcast and newspaper industries was not in the public interest. The Court of Appeals reached the opposite conclusion and remanded with instructions to implement the Court's conclusion. Indeed, unless reversed, "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." Slip Opinion at 60.

REASONS FOR GRANTING THE WRIT

This case presents an extraordinary example of judicial activism, wresting from broadcast licensees their co-located daily newspapers, or vice versa. The decision of the Court of Appeals is grounded in: "The First Amendment seeks to further the 'search for truth.' Surely that search will be facilitated by government policy that encourages the maximum number of searchers." Slip Opinion at 24. Never before has this or any other Court suggested that the searchers for truth in the print medium may not search for truth in the electronic medium in the same city. The Constitution may not be so wildly contorted as to provide the base upon which the decision of the Appellate Court rests. Neither the First Amendment nor the public interest standards of the Communications Act, 47 U.S.C. § 309(a) (1970), *command* the divestiture ordered by the Court.

This case presents the opportunity to act upon an important federal question which has not been but should be settled by this Court. Further, the District of Columbia Circuit was concededly dealing with a matter of policy:

We summarize the record only to the extent necessary to show that in determining its divestiture policy, the Commission necessarily had to rely primarily on policy, not factual considerations. Slip Opinion at 37-38.

In order to reach the result it did, the Court had to find the Commission's policy determination to be arbitrary and capricious or otherwise not in accordance with law. This it could do only by substituting its judgment on matters of policy for that of the Com-

mission and in so doing "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19(b). In short, the Appellate Court has "misapprehended or grossly misapplied" the arbitrary and capricious standard. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 292 (1974). Finally, in remanding to the Commission with instructions to adopt a specified rule, the Court acted inconsistently with the guidance of this Court in *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) and *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974). Following *Idaho Power* and *Food Store Employees*, the Court should have remanded to the Commission in order that the Commission reconsider its policy as to whether divestiture is required. Failure to so behave is a direct affront to the well known instructions issued by this Court.

I. The Constitutional-Statutory Basis for the "Presumption" in Favor of Divestiture Is But a Charade To Mask the Court's Assignment to Itself of a Legislative Function

The Administrative Procedure Act in 5 U.S.C. § 706 provides:

The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or]

* * *

(E) Unsupported by substantial evidence. . . .

In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), the Court noted that the foregoing were two of six "separate standards" and that: "We can discern in the Commis-

sion's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." *Id.* at 290. It is by this standard that the Court of Appeals' treatment of the Commission's deliberative process must be weighed.

Not surprisingly the Court below was unable to find any specific support in the First Amendment or in the Communications Act to support its order of across the board divestiture irrespective of the absence of any evidence of harm. The Court below properly noted that "no provision of the Communications Act expressly grants the Commission authority to restrict newspaper ownership of broadcast stations" and then went on to improperly conclude that no such express authority was essential based upon *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1967). However, *Southwestern Cable* involved a determination of the existence of the Commission's regulatory authority.⁷ The case had nothing to do with whether the exercise of a policy judgment was arbitrary or capricious.

No one would today argue that the Fairness Doctrine is not constitutional, that robust wide open debate is not good, that broadcasters are not public trustees or that it is not the right of the viewers and listeners that is paramount. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1968). It is, however, a quantum leap to the proposition that no matter how well a broadcaster who owns a newspaper has served his community that "the interest of the public is presumed to be in maximum diversification of the airwaves." Slip Opinion at 51. That leap is the antithesis of the "searching and careful" inquiry a reviewing court is supposed

⁷ 392 U.S. at 161.

to afford agency action before it on appeal. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

In determining not to order divestiture except in monopoly situations, the Commission considered numerous factors. Even the Court below recognized that "the evidence [did not] point[] strongly one way or another"⁸ and that "[d]iversity and its effects are . . . elusive concepts not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."⁹ In determining that universal divestiture was not required, the Commission took into consideration many factors:

We remain no less convinced than before of the importance of diversity, but this is not the only point to consider. . . . There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be [to] outside interests. . . . Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too.

In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. . . . Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a

⁸ Slip Opinion at 49.

⁹ *Id.* at 48.

number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules, divestiture introduces the possibility of disruption for the industry and hardship for individual owners. FCC App. B, p. 93.

The rational basis that should have required the Court below to affirm is readily apparent. Indeed, any other result in view of the foregoing would have been difficult to sustain as not arbitrary or capricious.

As Judge Wright has written:

While the converse of arbitrariness and caprice is rationality, the APA authorizes the reviewing court to demand of rulemakers only the most basic, minimal sort of rationality. A judge cannot strike down a rule merely because it seems to him 'unreasonable' in the sense of being unwise or wrong, any more than he could upset Congressional legislation for that reason. . . . The reviewing court is not even authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. . . . This exemption of conventional rulemaking from the substantial evidence test is very important. . . . The Courts and The Rule Making Process: The Limits of Judicial Review, 59 *Corn. L. Rev.* 375, 391 (1974).

It is clear that the Court below has impermissibly substituted its own judgment for that of the Commission.

II. The Court of Appeals' Direction of the Commission To Enlarge the Required Divestiture Was Improper Without Affording the Commission the Opportunity To Reconsider

When the Court below "remand[ed] the record to the Commission *for adoption of a rule* not inconsistent with this opinion," Slip Opinion at 60, it usurped the administrative function and commanded, irrespective of all other considerations and absent waiver, universal divestiture. The Court of Appeals has now become a rule maker. Such action flies in the face of numerous cases to the contrary where this Court has reversed in its supervisory capacity.

In *National Labor Relations Board v. Food Store Employees Union*, 417 U.S. 1 (1974), the Court confronted similar District of Columbia Circuit usurpation of authority. There the Court of Appeals enforced an NLRB order but remanded to the Board for further consideration of additional remedies.¹⁰ On remand, the NLRB amended its order to encompass certain supplemental remedies but refused to order the employer to pay the union's litigation expenses and excess organizational costs.¹¹ Thereafter, in another case the NLRB ordered reimbursement of litigation expenses incurred when an employer engaged in frivolous litigation. In view of the intervening NLRB decision, the Court of Appeals in the instant case enlarged NLRB's order to require the employer to pay the union's litigation and excess organizational costs.¹² On certiorari, this Court reversed insofar as the judgment enlarged the NLRB order and remanded

¹⁰ 433 F.2d 541 (1970).

¹¹ 191 NLRB 886 (1971).

¹² 476 F.2d 546 (1973).

with directions that it be remanded to the Board for further proceedings. This Court unanimously held that notwithstanding facial inconsistencies between the intervening NLRB decision and its decision in the *Food Store Employees* case, it was reasonably possible that the Board could plausibly reconcile the seeming inconsistency, and therefore it was improper for the Court of Appeals to enlarge the NLRB order without first affording the NLRB the opportunity to clarify the inconsistency. 417 U.S. at 9-11.

Much of the Court of Appeals' reasoning behind ordering universal divestiture is its conclusion that the facts do not warrant a distinction between newspaper-broadcast combinations that might otherwise be formed in the future and ones that already exist. Moreover, the Court below disagreed with where the Commission drew the line in ordering divestiture. Increased diversification can be achieved—and would have been by the rules under attack—without universal divestiture. None of the authorities cited by the Court below has any bearing on a nationwide “one-time alteration in the ownership structure of the broadcast industry.” Slip Opinion at 54. Should the Appellate Court’s newly announced proscription as to the disparate treatment between new combinations and existing ones remain the law, it is entirely possible that the Commission on reconsideration would conclude to order no prohibition as to future combinations. Further, it could well order hearings on the 16 “egregious” cases where divestiture has been required. In any event, a whole range of options available to the Commission on remand was foreclosed by the Court below. In *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) the Court corrected a similar usurpation: “On

remand the Commission might have reissued the order without the contested conditions or might have withheld its consent to any license. It is the Commission's judgment on which Congress has placed its reliance for control of licenses."

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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The first Amendment provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The relevant provisions of the Administrative Procedure Act of 1946, as amended, are as follows:

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Communications Act of 1934, as amended, are as follows:

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

